No. 16,273

United States Court of Appeals

For the Ninth Circuit

COOK AND SONS EQUIPMENT, INC.,
Appellant,

vs.

MORRIS KILLEN,
Appellee.

Appeal from the District Court for the District of Alaska, Third Division.

BRIEF OF APPELLEE.

BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Central Building, Anchorage, Alaska,
Attorneys for Appellee.

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JURISDICTIONAL STATEMENT.

We adopt the jurisdictional statement made by the appellant herein, in lieu of re-incorporating it in this brief.

STATEMENT OF THE CASE.

We have carefully read the statement of the case as set forth in appellant's brief by the Honorable Edgar Paul Boyko and have also read his statement of facts. It is regrettable that we are required to make a separate statement of the case and the facts, due to the fact that the statement made by the Honorable Edgar

Paul Boyko is so far from correct that it is misleading.

The statement on page 6 that the truck was used during an entire summer construction season is not true, and the evidence shows that it was only used for one week. (TR 40.)

On page 7 of appellant's brief, there is a statement: "shortly thereafter Connett defaulted, both in his contract with Killen and on the payments to the Bank of America". We call your attention to the fact that this default did not occur until late September, as three payments of over Four Hundred Dollars each were paid, amounting to $1,206.00. (TR 76.)

Then, on page 8, there is a statement, "presumable in anticipation of possible action to repossess". This is a creation of an ingenious mind, coupled with wishful thinking, as there is no evidence to even create a presumption of that kind.

On page 9 there is a statement that "at no time did he attempt to contact either the appellant or Cook and Sons, Inc., or the Bank of America".

It is quite clear, by the evidence, that Mr. Killen hired attorneys in the State of California to try and locate Connett and to try to find the truck. Naturally, it could be presumed that the investigation made in California brought Mr. Cook and his son to Alaska to try to get a release from Mr. Killen, as Mr. Killen testified.

We are setting out the evidence below for the convenience of the Court, and we will try to set forth the

facts as included in the part of the testimony that was transcribed and included in the transcript of record, which is as follows:

STATEMENT OF THE FACTS.

The plaintiff, Morris Killen, filed a complaint in the district Court at Anchorage, Alaska, on October 20, 1953, in which the plaintiff alleged that Charles Cook and Charles Cook, Jr., doing business as Cook and Sons Equipment Company, in the State of California, as defendants, wrongfully stole, took, and carried away from the Territory of Alaska one (1) certain truck automobile; namely, one (1) International dump truck, Model 1952, Motor No. RD450-18333, Serial No. 1252, of the value of $17,000.00, which was the property of the plaintiff. (See complaint set forth in Transcript of Record.)

The defendants were personally served in Alaska, near Anchorage. An answer was filed by Charles E. Cook, Jr. and Charles E. Cook, III, individually, and doing business as Cook and Sons Equipment Company, Inc. This answer alleged that Charles E. Cook, Jr., was the president of Cook & Sons Equipment Company, Inc., a California corporation, and that Charles E. Cook, III was a stockholder. Then an Answer for the corporation—Cook & Sons Equipment *Company,* Inc. was filed. We refer you to the answer printed in the transcript commencing on page 5. This corporation was never made a party as such.

The case came on for trial before the Honorable Albert L. Reeves, a visiting judge from Kansas City,

Missouri, having been assigned here by the Chief Justice of the Supreme Court of the United States. The principal defendant, Charles E. Cook, Jr. was called as the first witness, identified himself as one of the defendants in the action, and stated that he was Charles E. Cook, Sr. and the other defendant was Charles E. Cook, III. (See TR 33-34.) He admitted that he took the truck without the consent of anyone, and a local garage man assisted him.

Morris Killen was not in Alaska at the time, but Morris Killen's minor son was taking care of the place. There was no one at home at the time the truck was taken. Other equipment was dragged out of the way, and the truck was started by wiring across the ignition. Mr. Cook then left with the truck immediately. He crossed the border into Canada at daylight the next morning.

Mr. Cook testied that he had never seen Morris Killen before he took the truck and had given notice to no one that he intended to take it; that he had been in the Territory only a few days before he took it; that he was president of a corporation known as Cook and Sons Equipment Company, Inc. (TR 36.)

Morris Killen was called as a witness and testified that he owned and operated the Big Timber Lodge, which was stocked. There was a store, a restaurant, a night place and a bar. He handled gasoline. Regular family-served meals were offered in the cafe; there were approximately thirty-five (35) regular boarders, who were truck drivers on the road.

Mr. Killen further testified that on the 25th day of June, 1952, he entered into a contract with Mahlon J. Connett. The contract was offered and admitted in evidence, is an exhibit in the case, and is marked plaintiff's exhibit one. (We have carefully checked the transcript of record in this case and do not find this exhibit.) The contract provided for the trade of the truck, free and clear of all encumbrances, to Morris Killen for his business known as Big Timber. The truck was a Twin-screw LL-190, and the testimony shows that it was absolutely perfect and was new. (TR 40.) *The truck had worked one week when the trade was consummated.* Morris Killen was going into the construction business and intended to use this truck in his business. He had been in that business for a long time prior to owning Big Timber. Mr. Killen turned the Big Timber business over to Connett immediately after the papers were drawn up and delivered. The truck was traded at the value of $15,000.00, as a reasonable value in the transaction. (TR 41.) He qualified then to testify to the value of the truck; and after qualification, he placed the value at $15,000.00, including the other *stuff* that was in the truck. He received two (2) tires, tubes and wheels that had never been on the ground. Mr. Connett said he bought them outright and that they were not on a conditional sales contract *with the bank;* that the reasonable value of the tires, tubes and wheels was $400.00 to $450.00. Mr. Killen further testified that he received other tools with the truck and place some of his personal tools there also, the value of which was

between $15.00 and $25.00. Shortly after the trade he put the truck and all of his equipment away and stacked and winterized it. He stated that it was customary procedure for all contractors to winterize and stack their equipment in a small place, as small a place as they could. (TR 43.) It is done that way because it is usually dug out and serviced before the snow is off, to get it ready for the season. This equipment was stacked at Mr. Killen's home in Anchorage, together with considerable other equipment. (TR 44.) (There was also a D-6 caterpillar in the equipment.) The lot was fenced and was about 60′ by 100′. Morris Killen left his son in charge of the house and went outside.

Morris Killen stated that the contract entered into, whereby the sale of the Big Timber Lodge was traded for the truck, provided definitely that Mr. Connett would pay the balance due on the truck and would clear the encumbrances against it within 90 days from the date of the contract. The contract mentioned that the encumbrances to be paid by Mr. Connett were approximately $7,500.00. No other encumbrance was mentioned. Morris Killen did not know who the truck had been purchased from. The paper recited a balance of something like $8,500.00, but that $7,500.00 would pay off the indebtedness by reason of the discount for paying it before it was due. Mr. Connett had paid $5,000.00, or a little more, plus more than $1,200.00 for three (3) monthly payments. Morris Killen was ready, willing and able to pay the balance due on the conditional sales contract, had he

known that Mr. Connett had defaulted and had not made the payments as he agreed to do. There was nothing owing on the truck contract until some time in September of that year. Mr. Killen did not know that Charles Cook, or any of his family were involved in the transaction. He was told that the money was due a bank in California; the first information he had that there was a default in the payments due, or that Mr. Connett had not paid off the truck as he agreed to, was about September 20th, when he was called at his mother's home in Texas and told of the truck being taken from his home and having disappeared. No demand was ever made on him for any payment, whatsoever. (TR 48-49.)

Mr. Killen further testified that at the time he made the deal he understood that there was $8,500.00 due on the truck; Mr. Connett told him that, also showed him the three (3) receipts, or one (1) receipt for three (3) payments, he could not remember which, which amounted to more than $1,200.00 and which was paid 90 days in advance. (TR 50.) Mr. Connett was to make the payments to the Bank of America in California and give Mr. Killen a clear title, under the agreement. (TR 50.) The papers he took showed a lien to the Bank of America, and they arrived at the pay-off figure of $7,500.00, if paid off within the 90 days. (TR 51.)

Morris Killen testified on cross-examination that Mr. Connett left Big Timber Lodge; and that he, Morris Killen, took back what was left but he had no stock, blankets, windows, or anything else that he had

left at Big Timber; and he never operated it again. (TR 52-53.) Mr. Killen further testified that he would have paid the balance due on the truck if he had had an opportunity; that he did not contact the bank; that he entertained no doubt but what Mr. Connett would pay the truck off for the investment he had. (TR 51.) Mr. Killen had no idea that Mr. Connett would not fulfill the contract and agreement he had made. (TR 54.)

On redirect examination Morris Killen testified that he had no knowledge that any man by the name of Cook, or any company by the name of Cook, had any interest whatsoever in the deal. The discussion was that the original balance was something like $8,500.00, and that he had seen receipts for $1,200.00. That is how he arrived at the figure of $7,500.00. (TR 54-55.)

On recross examination Morris Killen testified that he never contacted the defendant, Cook and Sons, or any of them; that he did not know of them.

Then, on redirect examination, he testified that he tried to find the people driving the truck on the Alaska Highway. Mr. Killen made a diligent effort, he ruined his vacation, and spent several hundred dollars coming back up the highway to get hold of the truck, but could not find it.

Mr. Bob H. Killen, Dovie Killen, and Virgil Fey testified, but their testimony is *omitted from the transcript.*

Then, Charles E. Cook was called, in his own behalf stated that his name was Charles E. Cook, Jr., that

he had been in Court all during the hearing, that the truck in question was a 1952 new International, six-cylinder, three-axle dump truck. Then, a conditional sales contract was identified; Mr. Cook testified that it was entered into on May 7, 1952; it was marked for identification, introduced in evidence, and a photostatic copy of it is attached to the transcript of the testimony, page 108, and marked Defendant's Exhibit A. Mr. Cook further testified that Mr. Connett was given permission to take the truck to Alaska; that the bank insisted that he make three payments on the balance due before he left California, in order to evidence good faith, for which there was either three or one receipts issued directly by the bank; that a party coming down from Alaska told him Mr. Connett had traded the truck, that was about the middle of September, 1952; that no payment was due until September 20. (TR 60-61.) He came to Alaska about that time and then conferred with them (meaning the Bank of America) later. Upon arriving in Alaska, he looked up Mr. Connett at Big Timber Lodge. He knew that the truck had been transferred; he secured no satisfaction from Mr. Connett; that he came back to Anchorage and went to the home of Morris Killen, and no one was there at the time. Later he talked to the Killen boy. He introduced himself and told him who he was. (TR 63.) Mr. Cook told him he had come to get the truck; that the boy answered that his father and mother were in the States and his father wanted no one using the truck and no one was to touch it. (TR 64.) The boy said no one was to take the truck and that Mr. Cook could not have it. That was the

conversation as Mr. Cook recalled it. Mr. Cook repossessed the truck and kept it and used it in the name of Cook and Sons Equipment Company, Inc. until July, 1957; that he was never contacted by Mr. Killen or Mr. Connett; that he saw Mr. Connett, but Mr. Connett never offered to pay anything. (TR 65.) Mr. Cook further testified that he was back in Alaska about a year later and he did contact Mr. Killen. He pretended that he was trying to buy Big Timber Lodge and had more than one conversation with Mr. Killen relating to the purchase of Big Timber Lodge. Mr. Killen never accused him then of taking the truck illegally. (TR 66.) Mr. Cook testified that he did go to the Killen residence twice; the first time he went, Mr. Gillen was not there; the second time he had another fellow with him, who was someone in Anchorage with a tow truck. (The foregoing sentence relates to the actual picking up of the truck.) Mr. Cook employed the fellow with the tow truck to go with him to the Killen place. (TR 68.) Mr. Cook testified that he had had lots of experience, approximately fifteen years, in handling heavy equipment, a great deal of experience in picking up vehicles that were hidden away or that the police had in difficult spots to pick up. It was not an unusual circumstance for him. Then Mr. Cook drew a diagram of the Killen place. It was introduced in evidence but is not shown in the transcript of the testimony.

Mr. Cook further testified that he had the tow truck back up to the pick up; it picked up the rear end by means of jacking up the rear wheels, and

moved it sidewise. The truck was locked and he had no key. Mr. Cook very easily opened the cab of the truck, wired it across around the key and entered the truck. He started the truck and moved it back and forth, cleared the fence and then backed out and went on. (TR 70.) He took precaution not to damage any of the Killen property; he made a careful inspection to ascertain whether any damage had been done and was satisfied that none had been done. He testified that there was nothing in the cab, no tools of any kind or spare parts. He then described what normal accessories were and the spare parts bought by Mr. Connett in California. (TR 71-72.) He further testified that, to the best of his recollection, this truck transaction with Mr. Connett ran over a period of two or three months while he was attempting to sell it and get it financed, and was actually consummated on the seventh day of May, 1952. Another exhibit was introduced at that time and marked Exhibit B, but it is not attached to the transcript of record. He testified that the value of the truck, in his opinion, was $14,094; that the contract price referred to was $13,-496.18; that the contract showed on the back: "September 22, 1952, We hereby acknowledge receipt of $7,737.95 from Cook and Sons, Inc., in full payment of this contract, Bank of America, National Trust Association. Signed by Sally Owen, Assistant Cashier." (TR 75.)

Mr. Cook testified that the Bank of California demanded three (3) monthly payments before they would permit the truck to be taken out of California.

Mr. Connett paid $1,206.00, which was the approximate amount of three (3) payments. The contract indicated a balance of $9,685.64; and $1,206.00 was paid before the truck left California, leaving a balance of $8,470.00 which amount was reduced for prepayment of unearned interest down to $7,737.95.

On cross-examination Mr. Cook testified that he got the contract back about the 23rd or 24th of September. It was mailed to him in Anchorage and he received it by General Delivery at the Anchorage post office. He showed the contract to the attorney in Moody & Kay's office before he took the truck. He had been in Anchorage long enough to go to Big Timber and see Mr. Connett, who told him that he was not going to pay for the truck. Mr. Connett showed him the contract he had with Mr. Killen and told Mr. Cook where Morris Killen lived. Mr. Cook later saw Mr. Connett in California the same year; he had always been a dump truck operator and still is, so Mr. Cook believes. Mr. Connett was engaged in business in California but did not operate the truck in the business, Cook and Sons, Inc. It was operated by Cook and Sons, Inc. from the time he reached California with it. Mr. Cook sold it in July, 1957 to Mr. Leroy Chriseana. Mr. Cook came back to Anchorage after he took the truck in 1953. He talked to Mr. Killen; he drove to Homer to see him and his son was with him. Mr. Cook talked to Mr. Killen on the telephone from Homer to Anchorage; he talked to Mr. Killen in Anchorage later; he drove up here in 1953. He did not talk to Mr. Killen about signing a release over the

truck deal. Mr. Connett showed Mr. Cook his contract with Mr. Killen for the Big Timber Lodge in the Parsons Hotel. He made an offer of $1,500.00 as the down payment, he believes. He remembered Mr. Killen telling him that he had attorneys in California trying to find Mr. Connett.

Mr. Cook further testified that the Killen boy told him not to touch the truck and that his father was out in the States. When he went away from the Killen boy, he got someone with a tow truck to help him. He returned to the Killen home sometime after one o'clock; he knew that the boy was going to work at one o'clock and that Mr. Killen and his wife were not in Anchorage. The Killen boy told him that he would have to be at work at one o'clock; he did not see anything of the Killen family at the time he took the truck; he wired across the ignition and got the motor started. To stop it he would remove the wire; he operated it that way. He talked to no one in Anchorage after he got the truck, not to his attorney or anyone. He left Anchorage about 2, 3 or 4 o'clock. It was still daylight in September, the 24th or 25th. He did not see Mr. Connett when he went by the Big Timber Lodge. He did not stop; he had seen him two or three days before. Mr. Cook went through Tok and over to the border and had to wait for it to open up in the morning. He drove home in six days. When he went to Killen's place, he did so with the intention of taking the truck; that in his opinion the value of the truck when he sold it was $13,496.18; Mr. Connett or Mr. Killen could have paid the debt off and received

the same discount. It was an excellent truck. He imagines that Eight Hundred Dollars would be about the right amount for freight charges from California to Anchorage. Then the defendant rested and Morris Killen was recalled.

Morris Killen testified about the spare wheels, tires and tubes; and he made this statement: "When I went Outside; when I stacked the equipment the tires, tubes, and wheels were in the back of the truck, and some of the parts referred to were in the cab of the truck. The axles were in the back of the truck, and this truck was never used one hour, just driven down, and there was some grease that came with the truck that I never used, and other things from Big Timber that was brought to my yard and stacked." He further testified that the tires, tubes and wheels and the axles were there, as well as miscellaneous tools, oil filters and points; and they were in the cab of the truck, locked up. He stated that he had no conversation with Mr. Cook at any time about Big Timber Lodge; that Mr. Cook and a man that was said to be his son tried to get a release from him, offered him Five Hundred Dollars and to pay the attorney's fees. This release was over the Connett deal concerning the truck.

Then on cross-examination, the application for registration certificate in Alaska for the year 1952 was received in evidence as Defendant's Exhibit C; and it is found in the transcript at page 110. (TR 98.)

Mr. Killen further testified that he went out to Texas some time in August; that the truck had been

at his home place, parked as described above, for a month.

This concludes all of the important part of the evidence that was transcribed, and specifically omits the testimony of several witnesses who testified to very material things.

ARGUMENT.

Before answering the argument set forth in the brief of the appellant, we wish to renew our motion to dismiss the appeal for all of the reasons set forth in the motion which was filed, and by this Court overruled.

(A) That the appeal is not a meritorious one, but is taken merely to delay plaintiff's action in making a collection of the judgment.

(B) That no defendant in the case has made any effort to appeal, and the notice of appeal filed was only filed by a corporation which was not a party to the law suit.

(C) That Cook and Sons Equipment, Inc., appellant, is not a party to the law suit. The real judgment debtors are Charles Cook and Charles E. Cook, Jr., doing business as *Cook and Sons Equipment Company, Inc.,* of the State of California, and there was not the slightest mention on the plaintiff's part to the effect that Cook and Sons Equipment, Inc. was ever sued in the case, or ever became a party in the case.

(D) That the appeal was not filed within the time provided by Rule 73, subdivisions (b) and (g) of the

Federal Rules of Civil Procedure and was not docketed within forty (40) days after the notice of appeal was filed.

(E) No notice of appeal was ever given by any judgment debtor; but the notice of appeal was given by a corporation who was not a party to the judgment.

We will ask the Court to give consideration to the memorandum filed herein, supporting the motion to dismiss, as we most respectfully contend that the authorities set out in the memorandum support the motion to dismiss.

We call your attention to the mistakes in the statement of the case by the Honorable Edgar Paul Boyko. He was not in the case at the time of the trial, and we can see how he would inadvertently make some misstatements. In a case of this kind it is important, in our opinion, and it is especially true since there is only a portion of the evidence brought up to this Court in the transcript of record, the testimony of several material witnesses being completely left out. The testimony of Mrs. Dovie Killen, Bob H. Killen and Virgil Fey was all given at length, and no part of it is shown in the transcript. Therefore, the appellant cannot raise the question on appeal that "the findings of fact and conclusions of law and judgment were wrong where the record does not purport to contain all of the official transcript and all of the evidence".

ANSWER TO ARGUMENT NO. I.

This argument, stripped of the extra verbiage, amounts to a contention that the Honorable Albert L. Reeves did not have authority to render the judgment that he did render and contends that the express statutory remedy is contained in the uniform Conditional Sales Act; and the Court had authority only to award damages within the authorization conferred upon it by the act just mentioned. Of course we disagree, to-wit:§§ 29-2-17, 29-2-18, and 29-2-19 A.C.L.A. 1949, are a portion of the Conditional Sales statutes of Alaska. I presume counsel relies upon these sections which are found in Chapter 2 of A.C.L.A., 1949 under the heading of Uniform Conditional Sales Act. For the convenience of the Court, I will set out those three sections, which are as follows:

> § 29-2-17.—Notice of intention. Not more than forty nor less than twenty days prior to the retaking, the seller, if he so desires, may serve upon the buyer personally or by registered mail a notice of intention to retake the goods on account of the buyer's default. The notice shall state the default and the period at the end of which the goods will be retaken, and shall briefly and clearly state what the buyer's rights under this act will be in case they are retaken. If the notice is so served and the buyer does not perform the obligations in which he has made default before the day set for retaking, the seller may retake the goods and hold them subject to the provisions of Sections 19, 20, 21, 22, and 23 (§§ 29-2-19-29-2-23 herein) regarding resale, but without any right

of redemption. (L 1919, ch 13, § 17, p 35; CLA 1933, § 3037.)

"§ 29-2-18. Redemption by buyer: Seller to furnish statement of sum due. If the seller does not give the notice of intention to retake described in Section 17 (§ 29-2-17 herein), *he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken,* and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them *and to continue in the performance of the contract as if no default had occurred.* Upon written demand delivered personally or by registered mail by the buyer, the *seller shall furnish to the buyer a written statement* of the sum due under the contract and the expense of retaking, keeping and storage. *For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer ten dollars ($10) and also be liable to him for all damages suffered because of such failure.*" . . . (Emphasis ours.) * * *

"§ 29-2-19. Compulsory resale by seller: Notice. If the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty per cent of the

purchase price at the time of the retaking, *the seller shall sell them at public auction in the state where they were at the time of the retaking, such sale to be held not more than thirty days after the retaking.* The seller shall give to the buyer not less than ten days' written notice of the sale, either personally or by registered mail, directed to the buyer at his last known place of business or residence. The seller shall also give notice of the sale by at least three notices posted in different public places within the filing district where the goods are to be sold, at least ten days before the sale. The seller may bid for the goods at the resale. If the goods are of the kind described in Section 8 (§ 29-2-8 herein), the parties may fix in the conditional sale contract the place where the goods shall be resold. (L 1919, ch 13, § 19, p. 36; CLA 1933, § 3039.)"

These sections of the statute contradict the contention of the appellant. We wish to call your attention to a portion of § 29-2-16 A.C.L.A. 1949 which reads as follows:

". . . Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law. . . ."

We now call your attention to § 29-2-25, which reads as follows:

"§ 29-2-25. Recovery of damages by buyer after retaking goods. If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 (§§ 29-2-18—29-2-21, 29-2-23 herein) after retaking the goods, *the buyer may recover from the*

> *seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest.* (L 1919, ch 13, § 25, p 38; CLA 1933, § 3045.)" (Emphasis ours.)

The rule set forth in 47 Am. Jur. page 151 is as follows:

> "As a general rule, the measure of damages for conversion of the property by a conditional vendor after the vendee has made payments on the purchase price *is the value of the property at the time of the conversion, less the unpaid balance of the purchase price.*"

This above statement described the case at bar here. The testimony is undisputed; Killen accepted the truck in the trade at an agreed price of $15,000.00, and Connett assumed and agreed to pay the balance due on the truck to the Bank of America.

In all fairness, the trial judge took into consideration the fact of the amount actually paid on the truck, the amount of the balance due thereon, which the defendant proved to be $7,737.95. (TR 75.) A casual reading of the trial memorandum of the plaintiff (CM 9), which is hereby made a part of this brief by reference as fully as if incorporated herein, and we especially make a part of this brief the memorandum opinion of the Honorable Albert L. Reeves, District Judge, which commences on page 13 and extends over to and includes page 20. (CM.) We also call your attention to the Findings of Fact commencing on page 24 and extending over to and including page 28. (CM.)

These findings of fact cannot be attacked by the appellant due to the fact that the entire transcript of the evidence is not filed herein and is not made a part of the transcript of record. In support of that contention, we cite *Lowman v. Kuecker,* 52 ALR2d 1380; (71 NW2d 586) and we quote a small portion of the opinion from page 1384, as follows:

> ". . . As to assuming facts not in the record, the record we have does not purport to contain all of the official transcript; the trial court heard all of the testimony, overruled the objection and permitted the answer. We are satisfied with the trial court's ruling."

In the case of *Genard v. Hosmer, et al.,* 189 NE 46, 91 ALR, page 543, we quote from page 544 as follows:

> "Rugg, Ch. J., delivered the opinion of the court: This is an action of contract. The cause of action is the alleged breach of a covenant in an assignment given by the defendants to the plaintiff. There were two hearings before the same judge of the Superior Court, who made findings and rulings. The evidence is not *reported in full* and the bill of exceptions does not purport to contain a summary of it all; therefore the findings of fact must be accepted as true. . . ."

In the case of *Book v. Book,* 141 Pac.2d 546, 167 ALR 352, we quote from page 358 as follows:

> "Even if we were to assume that the order now attempted to be brought here for review was an appealable order and that it was asserted to be a grave abuse of discretion on the part of the trial court in making it, we are unable to see how we

> could fairly charge that court with such a misuse of discretion *when we are not supplied* with the oral testimony . . . one filed February 21, 1942 and the other July 30 of that year."

The case of *Floride Noble, Respt., v. Edward B. Noble, et al.,* 243 Pac. 439, 43 ALR 1235, we quote from page 1236 in part as follows:

> ". . . The appellants also specify a number of respects wherein the evidence is asserted to be insufficient to support the findings of the trial court, but, since the evidence has not been produced upon this appeal, these specifications are also unavailing. . . ."

Another case supporting this contention is *National Nontheatrical Motion Picture Bureau, Inc. v. Old Colony Trust Company,* 169 N.E. 508, 67 ALR 1509, in which syllabus 6 explains the law of that case; and we prefer to cite that syllabus rather than the body of the opinion:

> "6. Where evidence upon which a finding of fact by the trial judge was based, is not before the supreme court, the finding is not open to question."

This case is directly in point; but we feel that the rule is so well settled that it is not necessary to cite additional authorities. However, we deem it advisable to cite the Am. Jur. citations that were used by the Honorable Albert L. Reeves and mentioned in our trial memorandum here, which are as follows:

> "47 Am. Jur. 134, Section 927, at page 136 describes the rights acquired by transferee.

"'Rights Acquired by Transferee: Rights of Original Vendor. * * * The rights acquired by a transferee of the conditional vendee include the right of possession the right of acquiring a complete title by payment or tender of the balance of the price agreed upon—even prior to the due date of all the remaining instalments and despite express restrictions against sale, assignment, or mortgage—and the right to redeem the property after default.' * * *"

As to the question of the vendors' liability for violation of the vendee's rights, whose rights were acquired by plaintiff Killen as a good faith purchaser, the appellee cites 47 Am. Jur. 150, Section 941, as follows:

"'Vendor's liability for violation of Vendee's rights. * * * A conditional vendor who refuses to grant to the vendee his statutory right of redemption where he is entitled thereto renders himself liable for conversion or statutory penalty. *Likewise, the vendor is liable to the vendee for damages in retaking the property in an unlawful manner, as by trespass or the use of force,* or for the unlawful disposition or resale of the property after repossession, such as by a sale not in compliance with statutes relating to resale, or by failure to sell as required by such statutes. * * * Under the Uniform Conditional Sales Act, if the vendor, after retaking the goods, fails to comply with the provisions of the Act regarding redemption, compulsory resale by the vendor, resale at option, of the parties where there is no resale, the vendee may recover from the vendor his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have

been made under the contract with interest.' * * *'' (Emphasis ours.)

We are at a loss to understand the contention of the appellant to the effect that the statutory remedy is in control; conceding, for the sake of argument, that the Alaskan statute does control. Then the decision of the trial judge is absolutely right in every way.

ANSWER TO ARGUMENT NO. II.

This seems to be a rehashing of the argument number I, with some rather unusual statements that are not supported by the evidence.

The case cited—*Mitchell v. Automobile Sales Co.*, 28 S.W.2d 51, 83 ALR 955, does not support the contention of the appellant, and is clearly against appellant's contention.

There being nothing except wild statements which are contrary to the testimony set forth in the second argument, we do not deem it necessary to answer to any extent since it is contrary to the evidence in the case, and the law cited in the only case is contrary to the contention of the appellant. We will pass on to argument no. III.

ANSWER TO ARGUMENT NO. III.

This argument is also an argument for the lower Court and a similar argument was made there. The appellant cites *Abelleira v. District Court of Appeal*

(Cal., 1941), 109 P.2d 1942; and we finally found this case, not at 1942 but at page 942. It is a mandamus and prohibition suit in which, after reading it carefully through the many pages, I can find nothing that is helpful or even persuasive or in support of appellant's position.

Then appellant cites *Tonningsen v. Odd Fellows' Cemetery Assn.,* 213 P. 760. There is also an error there in the citation, and I ran the index to cases and found a similar case there. I presume it is the one relied upon by the appellant. It is found at 213 P. 710 and is an action in ejectment of certain land in San Mateo County which was used for a cemetery; but I can find nothing in the case to uphold the statements of counsel for appellant.

Then we have a quotation from Section 29-2-25 ACLA 1949. It very clearly implies that the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sums of all payments that have been made under the contract, *with interest.*

The Honorable Albert L. Reeves did exactly that, and we call your attention to his memorandum opinion printed in the transcript, commencing on page 13 and extending over to page 20; and the adoption of the method of determining the damage was exactly right, so we cannot see any merit to argument number III. The wild statements made therein are not supported by the transcript as filed in the case. In another place in the brief, counsel states: "The Act was only intended to protect conditional vendees and their as-

signs against unfair forfeiture and not to lead to their unjust enrichment at the expense of a vendor, acting in good faith, . . .". We call your attention to the fact that the written contract between Connett and Killen provided that Connett would pay the balance due on the truck within 90 days; that Killen turned the property over to Connett and sold him his store, restaurant, night place and bar, including a gasoline station; that they were all stocked; and in fact, Killen stated that "I had quite a stock in there." (TR 37-38.) He turned it over to Connett. Right after the contract was executed, on June 25, 1952, which would have given Connett up to the 25th of September, 1952 to pay off the debt; and the evidence shows that Mr. Cook came to Alaska before another payment matured, three payments having been made in advance; that defendants had not been required to take the paper up from the Bank of America, at that time. But while he was here, he contacted the bank and took up the paper; and arbitrarily and clandestinely, knowing that Morris Killen was out of Alaska, went to his home when there was no one there, and by prearrangements, had a garage man with him, who had a tow truck, and took this truck. This was getting quite close to larceny. Then, in violation of the statutes in full force and effect in the Territory of Alaska, ran out and drove the truck through the night and had to wait at the border to clear into Canada on the highway. This is admitted in the evidence, and even that he had been told and knew that Morris Killen's son had to be at work at one o'clock. He waited until

after that hour to do these unholy acts, and yet counsel for appellant will endeavor to put up a smoke screen and attempt to say that the defendants acted in good faith, even though they violated the statutory law of the Territory of Alaska and all moral laws, and took a truck that was worth $15,000.00 in Anchorage, Alaska, back to the States, concealed it from Morris Killen, and caused Morris Killen to have to employ attorneys in California to locate Connett.

I cannot understand the philosophy of the appellant in attempting to have this Court reverse the District Court at Anchorage by ignoring the written opinion signed by the Honorable Albert L. Reeves (TR 1-3), the findings of fact and conclusions of law (TR 26), and the judgment (TR 29).

We will now hasten on to the fourth argument.

ANSWER TO ARGUMENT NO. IV.

This No. IV is another argument that was made to the trial Court and is not meritorious, in our opinion. They complain about the Court determining that Mr. Killen's equity in the truck was $6,562.02. This was very simple to arrive at and was supported exactly by the evidence, and in fact, denied by no evidence. The testimony justified the Honorable Albert L. Reeves in that finding, as is disclosed by the memorandum opinion on the merits of the case. The testimony of Mr. Killen was that the truck was of the reasonable value of $15,000.00 in Alaska; that it was

new and in perfect condition (TR 42); that the spare tires, tubes and wheels were of the reasonable value of $400.00 to $450.00; that he had other tools in the truck of the reasonable value of $15.00 to $25.00. (TR 43.)

The defendant, Charles E. Cook, Jr., who admitted that he took the truck, fixed the value at about $14,-094.00 and stated that in the contract, the California value, or contract price, was $13,496.18; admitted that there were many extras with the truck; stated that he paid $7,737.95 to the Bank of America, National Trust Association, to clean up the balance due on the contract that he had assigned to them (TR 75); admitted that he got it back while he was here in Alaska, and his actions showed conclusively that he got it back for the purpose of taking the truck to California, and showed no inclination to allow the owner to pay the balance due, but, almost like a thief in the dark, took it and ran to California and left Mr. Killen to try to find out where his truck had gone.

The court found, in Finding of Fact No. X, that the reasonable value of the truck was $14,300.00 at the time the defendants took it from the plaintiff and out of Alaska, and the balance due on the contract was $7,737.95, leaving the plaintiff's equity in the truck at $6,562.05, and to that he added the interest at six per cent per annum on that sum from the 27th day of September, 1952 until the day of judgment, which interest came to $2,362.32 if paid on September 7, 1958, plus all costs of the action, including an attor-

ney's fee as provided by the rules of the District Court of the Territory of Alaska, and by said rules, plaintiff was entitled to recover attorney's fee of $678.48.

The honorable trial judge certainly had the evidence before him to justify his findings, and, in his memorandum opinion, on page 13, he clarified all of the details, and it seems to me that Argument No. IV is nothing more than an argument to be made to the trial court at the time, since it is based upon the argument that was made and both plaintiff and defendant testified that the truck was in perfect condition. Counsel for the defendant injected into this fourth argument so many things that are not included in the evidence and should not be considered, as they are purely counsel's own ideas and were not even argued by the trial lawyer representing the defendants when the case was tried. Counsel for the defendants makes the statement "and probably used up its accessories for an entire Alaska construction season"; he knows that is not a fact and should not attempt to make such a statement in view of the testimony that it was only worked one week after it reached Alaska. He attempts to assume the conditions of the Alaskan Highway, and makes a shocking remark about it, when there is no evidence to justify such assertions. He also makes a statement to the effect that automotive equipment brought into Alaska over the Alaskan Highway depreciates in value, when there is no evidence to support such a statement. The

$800.00 being the reasonable cost of bringing this truck to Alaska was a fair deduction by the trial court, since both plaintiff and defendant testified to that. He objects to the judgment of the court over on page 20, in the allowance of interest on the new value of the truck, including the $800.00 transportation item. Nowhere is there any evidence to contradict this matter.

We have studied the case of *C. W. Raymond Co. v. Kahn*, 145 N.W. 164, 51 LRA (ns) 251, and the case has no bearing whatsoever on the questions raised here. We have noticed that the appellant has quoted nothing from the case; therefore, we had to study it thoroughly and can find nothing that would affect this case.

Counsel for appellant contends that the Alaskan statutes quoted in the memorandum opinion and in this brief should control this case, and in the next breath he says (TR 19): "While it is obviously true that a truck delivered in Fairbanks is worth more than the same truck F.O.B. in Los Angeles", and attempts to qualify it that it must be shipped by conventional means, although he is completely estopped to make such a statement by the testimony of both the plaintiff and the defendant that the truck was in excellent condition at the time it was taken, and the honorable trial judge gave the defendants the benefit of the doubt and fixed the value of the truck at $14,300.00, instead of the $15,000.00 testified to by Mr. Killen, and was, in our opinion, very fair to the de-

fendants, who had put themselves in such a position by taking this truck out of the Territory of Alaska in violation of law and depriving the owner of the use thereof. All equity and good conscience were against the defendants as far as the facts were concerned, and we feel that Argument IV is purely irrelevant and should not affect this honorable court in the least.

ANSWER TO ARGUMENT NO. V.

If you will notice the record, there were so many Charles Cooks involved in this operation, and they were sued as a partnership, doing business as Cook and Sons Equipment Company in the State of California, and the word "corporation" was not mentioned. Just who the real partnership was remained more or less a mystery, although Charles E. Cook testified that he was the oldest of the other two (implying all three of them were members); stated he was Charles E. Cook, Sr. (TR 34), referred to Charles E. Cook, III as his son, and at the close of the evidence, no motion was made to dismiss the case as to the other partners, but he answered in the case for Charles E. Cook, Jr. and Charles E. Cook, III individually and doing business as Cook and Sons Equipment Company, and then added the word "Inc." (TR 5-6.) He filed an answer for a corporation that was not made a party to the action and failed to allege the necessary allegations to get it in good standing under the laws of the Territory of

Alaska and under the Federal Rules of Civil Procedure. It is a well established rule of law—so well established that no citations are requested—that individuals may act for and on behalf of a corporation in such a way that they themselves become liable, and in this case the evidence points to that conclusion, and therefore all of the judgment debtors are properly included in the judgment.

No objection having been stated in the trial court to the inclusion of Charles Cook, III, and the first time that we know of this being mentioned was in this brief in Argument V, and the appellant not having furnished a transcript of the evidence in this case and filed it in this court, it is too late to raise that question for the first time on this appeal, and while these designations, Charles E. Cook, Sr., Charles E. Cook, Jr. and Charles E. Cook, III, are confusing, the defendants never went to the trouble to clarify their identity and the judgment insofar as it included Charles E. Cook, III, should not be disturbed on this appeal, as there is no place in the record showing that Charles E. Cook, Jr. appealed at all from the judgment rendered. The only notice of appeal that was filed, and the only one we know anything about, is found on page 31 of the transcript, and that notice of appeal (being jurisdictional) was given only by Cook and Sons Equipment, Inc., which did not appear anywhere in the trial of the case or the judgment. Nowhere did Charles E. Cook, III give any notice of appeal in this case, and therefore the question raised by Argument V is not before this Honorable Court.

Appellee, having fully replied to the brief of the purported appellant, asks that the purported appeal be dismissed and the judgment of the trial court be affirmed.

Dated, Anchorage, Alaska,
December 3, 1959.

BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
By BAILEY E. BELL,
Attorneys for Appellee.